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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 185

JOSEPH F. MARRON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The two opinions rendered by the Circuit Court of Appeals are reported in 8 F. (2d) 251 and 18 F. (2d) 218, respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1926 (R. 540), and rehearing denied January 31, 1927 (R. 541–542). The petition for a writ of certiorari was filed February 24, 1927, and was granted April 18, 1927 (R. 546). Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(*a*) Is it a violation of the Fourth Amendment for officers, during the orderly execution of a warrant directing a search for specified articles of contraband, to seize documents relating to the origin, keeping, use, and disposition of the contraband named in the warrant?

(*b*) Is it a violation of the Fourth Amendment for officers, after making a lawful arrest for an offense committed in their presence, to search the immediate premises wherein the offense was committed for proofs of guilt within the control of the accused but not upon his person?

(*c*) Is a ledger wherein were recorded items of payment for purchases and deliveries of intoxicating liquors, amounts received for its sale, "gifts" made to city police, and wages paid various persons employed in and about the place where said intoxicating liquor was sold and kept for sale in violation of the National Prohibition Act, a "means of commission" of the offense of conspiracy to violate that Act?

STATEMENT OF THE CASE

On October 1, 1924, Prohibition Agent C. A. Howard applied to a United States Commissioner in and for the Northern District of California for a warrant to search the entire second floor at 1249 Polk Street, San Francisco, California, for intoxicating liquors. Included in the application was an affidavit by Howard that the premises were owned or occupied by Eddie Marron; that intoxicating

liquors were kept, sold, possessed, and bartered there in violation of the National Prohibition Act; and that on or about September 22, 1924, the affiant had visited the premises and had purchased from the person in charge, who was fully described, fifteen drinks of Bourbon whiskey, for which he had paid fifty cents each. (R. 55–57.) On the same day the Commissioner issued a warrant authorizing the Federal Prohibition Director for the State of California, his assistants, agents, and inspectors, to enter the premises described in the affidavit and to search said premises for intoxicating liquors and for property used in connection with the manufacture thereof, and if found to seize and take possession of the same to be dealt with according to law. (R. 57–59.)

On October 2, 1924, Howard and three other Federal prohibition agents, with the search warrant in their possession, went to the premises in an automobile driven by one Fred Carmona. (R. 90, 136.) Under instructions from the agents, Carmona gave the signal required to gain admittance by ringing the door bell three times, whereupon the agents were admitted. (R. 132, 136–137.) Upon entering they found a dozen men and women present, some of them seated at a table upon which was a bottle containing whisky and a number of glasses, whereupon the officers seized the bottle and its contents. (R. 93–94.) The premises, comprising a flat of six or seven rooms, were unfurnished except for a davenport in one room, an ice chest in the kitchen, a num-

ber of tables and chairs, several slot machines, and a cash register. (R. 132.) The agents handed the search warrant to the person in charge, one George Birdsall (R. 121), whom they placed under arrest (R. 100, 125). Upon searching the place the agents found and seized a large quantity of intoxicating liquor of various kinds, some of which was secreted in a trap in a closet in the front room. (R. 138–139.) In the search of this closet the agents noticed on a shelf, either underneath or on top of a cigar box containing "a lot of greenbacks," an account book or ledger showing inventories of liquors, gross receipts, expenses, various gifts made to police officers, and other entries pertaining to the business carried on in the establishment. (R. 98, 118, 126–131, 144–146.) This ledger the officers took into possession (R. 126), as they did also a number of bills for gas, electric light, water, and telephone service furnished the premises. The bills were lying beside the cash register and were made out to petitioner as proprietor of the premises. (R. 103, 107–112.)

An indictment was subsequently returned in the District Court of the United States for the Northern District of California charging petitioner, together with Birdsall and four others, with conspiracy to commit various violations of the National Prohibition Act, including the maintenance of a common nuisance on the premises in question. (R. 3–50.) Prior to trial petitions were filed for the

return of the ledger and other papers seized and to suppress their use in evidence on the grounds, among others, that the affidavit and the search warrant based thereon did not mention or describe any papers to be seized, but called for the search for and seizure of liquors and paraphernalia for their manufacture; that the ledger and other papers seized were not the instruments or fruits of crime, but were the private papers and property of the petitioner, and that the seizure of such papers was in violation of the Fourth Amendment and their introduction in evidence would be in violation of the Fifth Amendment. (R. 51–76.) The petitions were denied. (R. 77–78.) Objections on the same grounds to the introduction of said book and papers during the trial were likewise overruled. (R. 95–98, 102–103.) At the trial a handwriting expert testified that ninety per cent of the entries in the ledger, beginning with page 34, were made by the petitioner. (R. 264–265, 286.) These entries showed that petitioner was the proprietor of, or at least a partner in, the illegal liquor business conducted on the premises. (R. 126–130.) Petitioner and four of his codefendants were convicted. Upon writs of error sued out by petitioner and three other defendants, the Circuit Court of Appeals reversed the judgment as to petitioner on the ground that evidence relating to the seizure of liquor from him at places other than the premises here involved had been erroneously received. The admission in evi-

dence of the ledger in question was, however, held proper. *Marron* v. *United States,* 8 F. (2d) 251.

Upon retrial the petitioner was again convicted (R. 83, 84) and was sentenced to two years' imprisonment in the Leavenworth Penitentiary and to pay a fine of $10,000 (R. 88–89). The conviction was affirmed by the Circuit Court of Appeals, which held that its former decision as to the admissibility of the documents in question had become the law of the case. (R. 536–537.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. The sole ground upon which petitioner asks that the judgment be reversed is that the seizure of the aforesaid book and papers and their admission in evidence against him over his objection violated his rights under the Fourth and Fifth Amendments.

SUMMARY OF ARGUMENT

Petitioner's reliance upon the Fifth Amendment is based solely upon the claim that the seizure of the ledger and of the water, gas, telephone, etc., bills violated his rights under the Fourth Amendment. The single broad question involved is, therefore, whether such seizure contravened the Fourth Amendment. As the officers were lawfully upon the premises pursuant to a valid search warrant and made no *search* for anything other than the articles named in the warrant, the only pro-

vision of the Fourth Amendment which has any application is that against unreasonable *seizures.*

The search was for liquor and other contraband articles. It was authorized by the valid search warrant in the officers' possession. It was likewise authorized as an incident to the lawful arrest made by the officers upon the premises for an offense committed in their presence.

Viewed as having been made by virtue of the warrant, the seizure of the documents in question, which were incidentally discovered in the course of an orderly search for the contraband named in the warrant, comes squarely within the decision of this Court in *Adams* v. *New York,* 192 U. S. 585, which in that respect has never been overruled or modified by this Court.

Viewed as having been made by virtue of the lawful arrest, the seizure of said documents as evidence tending to prove the offense for which the arrest was made was within the authority and duty of the officers to take whatever they found within the possession or control of the prisoner which might be of aid in securing his conviction of such offense.

Aside from its character as evidence, the ledger, used to record the transactions of the illegal business which constituted the crime, was a " means of commission " of such offense and therefore properly seizable as an incident to the lawful arrest.

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ARGUMENT

THE SEIZURE OF THE DOCUMENTS IN QUESTION WAS NOT "UNREASONABLE" UNDER THE FOURTH AMENDMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment, so far as here material, reads:

> No person * * * shall be compelled in any Criminal Case to be a witness against himself * * *.

Reliance by petitioner upon the above-quoted provision of the Fifth Amendment is based solely upon the claim that the admission in evidence in the criminal prosecution against him of the ledger and other papers seized by the Federal officers compelled him to be a witness against himself because such seizure violated the Fourth Amendment. *Gouled* v. *United States,* 255 U. S. 298, 306–311; *Agnello* v. *United States,* 269 U. S. 20, 32–33. The single broad question in the case is, therefore, whether the seizure contravened the Fourth Amendment.

As appears from the record, the officers entered the premises pursuant to a warrant, the validity of which is unquestioned, authorizing them to search for and seize intoxicating liquors and property designed for the manufacture thereof. It further appears that upon entering the officers saw the offense of maintaining a common nuisance in violation of the National Prohibition Act committed in their presence, and that they immediately placed the person in charge under arrest. There is, moreover, nothing in the record to indicate that the officers made any *search* for incriminating documents and papers of any sort. On the contrary, the record plainly shows that the ledger and bills, the seizure of which forms the substance of petitioner's complaint, incidentally came to the officers' attention while they were conducting an orderly search for liquor and the means of manufacturing it. It is obvious, therefore, that the only provision of the Fourth Amendment which has any application to the facts of the instant case is that against *unreasonable seizures of papers,* and that that provision can be held to have been violated only by concluding that the seizure of the ledger and bills was not justified either as an incident to the search authorized by the warrant or as an incident to the lawful arrest made by the officers upon the premises.

The question of the reasonableness of the seizure in this case is not an easy one. The ten decisions of this Court from the *Boyd* to the *Byars case* have,

with the exception of the *Adams case,* which arose in a State court and related to a seizure by State officers, all involved circumstances of arbitrary action on the part of Government agents who searched without making an arrest at the place of search, and who entered either without a search warrant or under color of a warrant fraudulently or unlawfully obtained. Thus, no one of the cases wherein this Court has construed the Fourth and Fifth Amendments in relation to seizure of documents has grown out of circumstances similar to those of the instant case. Since, as frequently pointed out in comments from this Court, the application of the Fourth Amendment to each search must rest upon its own peculiar facts, none of the decisions from this Court are determinative of the issues here. The facts of this case present, in current litigation throughout Federal courts, one of the most frequent causes of appeal. District Courts have variously applied quotations from this Court, especially from the *Silverthorne* and *Gouled* opinions. Circuit Courts of Appeals have done likewise. Consequently, as pointed out by the Government in its brief in reply to the application for writ of certiorari in this case, a direct conflict has arisen between decisions in the Ninth Circuit, including the instant case and decisions in the Second Circuit, particularly in the *Kirschenblatt case.* The petitioner relies almost wholly upon opinions from the Second Circuit, backing them up by excerpts, torn out of their natural setting of facts, from the

Gouled, Silverthorne, Boyd, and *Weeks cases.* The *Kirschenblatt case* presents the most conservative view of the power of Government agents under the Fourth Amendment, deciding (a) that after arrest of a defendant *nothing except his person* may be searched for evidence of his guilt, and (b) that nothing may be seized incidentally to the execution of a lawful search warrant *except the articles named in that warrant.*

Interesting inquiries arise out of that extreme view. Must agents, observing a man in the commission of an offense, and after arresting him lawfully, *stay their hands* from picking up evidences of his crime which, before the officers could search his person, he may have thrown to the floor or concealed in the room where the crime was committed? Must officers, while lawfully searching for contraband named in a search warrant, *close their eyes* when a document closely related to possession and disposition of the contraband for which they are searching falls under their scrutiny? Is the Government to be limited, when its agents have gained lawful entry under warrant, to taking *only* the things which by foreknowledge the officers were able to list in the affidavit? Since the Government may use evidence which officious or malignant private citizens or State officers may have stolen or tricked from the possession of the defendant (*Burdeau* v. *McDowell*), are Government officers, engaged in a lawful and orderly search after lawful entry to have their hands tied from taking "evi-

dences of guilt" which may incidentally come to their attention during the search? Were the guaranties of the Fourth and Fifth Amendments meant to go that far? Do their spirit and purpose thus result in a premium on private evidence gathering and so disproportionately impair the effectiveness of Government officers who have made lawful entry and are engaged in orderly performance of their duties? The Second Circuit in the *Kirchenblatt case* answers "Yes." Petitioner herein argues for such construction. But the Government maintains, as decided by the Circuit Court of Appeals for the Ninth Circuit in the instant case, that the Fourth Amendment protects the citizen only against *unreasonable* searches and seizures. And it is not unreasonable for officers after lawful entry pursuant to a warrant while engaged in an orderly execution of the mandates of that warrant to take as incidental to its execution documents relating to the object of the search, the documents being thus "constructively" attached to the articles described in the warrant. On the contrary, we believe that for officers to be unable to take documents of that kind under such circumstances would be unreasonable. The Government further maintains that after an arrest for an offense committed in the presence of officers, it is not unreasonable for them to search for evidences of guilt, not only the person of the accused (a right long recognized throughout English and American law), but also the immediate environment where the crime was

seen to take place; that a lesser right would unduly hamper the administration of justice; that it would have a tendency to sanctify a criminal's isolation and secrecy after knowledge of his crime was in the possession of the Government, and that such restriction upon officers engaged in making a lawful arrest is beyond the intent of the Fourth and Fifth Amendments.

Certain clear doctrines applying the Fourth and Fifth Amendments to specific kinds of searches and seizures have been announced by this Court in a series of cases since 1885. Though none of these decisions, with the exception of the *Adams case,* as hereinafter pointed out, cover the facts of this case, a brief review of each to indicate its points of difference from the facts herein is deemed advisable.

Boyd v. *United States,* 116 U. S. 616 (1886): Plate glass was seized by the Collector under the customs laws. The United States Attorney filed an information for forfeiture. The District Judge, pursuant to Section 5 of the Customs Act of June 22, 1874, required the claimants to produce the invoice of twenty-nine cases of glass. Claimants resisted on the ground that in so far as the statute compelled production of evidence to be used against claimants in a forfeiture proceeding it was unconstitutional and void. In this contention they were sustained by this Court in an elaborate opinion holding that the Act violated both the Fourth and Fifth Amendments.

Adams v. *New York,* 192 U. S. 585 (1904): New York police officers seized, pursuant to a valid search warrant, policy slips and other papers incidentally discovered and related to the charge only in that they showed the defendant's custody, with knowledge, of the policy slips. Pretermitting the question of whether the claimed protection of the Fourth and Fifth Amendments against the use of the papers not named in the warrant extended to actions by State authorities, this Court decided that the seizure of the papers was lawful as incidental to the execution of the warrant. The facts in that case were very similar to those of the instant case and are more fully discussed under subdivision (A).

Weeks v. *United States,* 232 U. S. 383 (1914): Defendant was arrested at the Union Station in Kansas City. Police officers went to his home without a warrant and seized heirlooms, papers, stocks, bonds, and various personal effects. Later in the day the United States Marshal, without warrant, entered defendant's room and carried away letters from his chiffonier. A timely motion for their return was made and denied. This Court held the motion should have been granted and that the taking violated the Fourth Amendment. It distinguished the *Adams case,* pointing out that the documents in that case were not the subject of an unreasonable search and seizure, but, on the contrary, "incidentally seized in the lawful execution of a warrant and

not in the wrongful invasion of the home of the citizen" (p. 395). The decision further held that a court has a right to deal with papers in the hands of the District Attorney and officers of the court and should return those wrongfully taken when seasonable application for their return has been made. It is to be noted that in this case wrongful entry of the defendant's home under "color" of Federal office but *without legal sanction of any kind* was the object of condemnation by this Court.

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385 (1920): The two Silverthornes were arrested at their home and held there for several hours during which time United States officers "without a shadow of authority" seized all the books and documents to be found at their office and brought them with all employees to the office of the District Attorney. An immediate application was made for the return of the property seized. Meantime copies were made. The District Court ordered the originals returned but impounded the copies. *Subpœnas duces tecum* were then issued to produce the originals. The defendants resisted, were fined, and ordered imprisoned. This Court held that to assume that the "Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act" has the effect of reducing "the Fourth Amendment to a form of words." Holding that the *Adams case* was distinguishable, the opin-

ion cited with approval the principles stated in *Flagg* v. *United States,* 233 Fed. 481, 483. The *Flagg case* involved an *unauthorized entry,* seizure of defendant's books and papers, denial of his timely application for their return, and the study of them for three years, with final prosecution and conviction based thereon. But in neither it nor in the *Silverthorne case* did search of the place follow a valid arrest made for an offense committed there in the officer's presence, nor was the seizure incidental to search after lawful entry under a warrant.

Gouled v. *United States,* 255 U. S. 298 (1921): This opinion has been perhaps misapplied in lower courts more often than any other. To decide whether a search or seizure has been unreasonable it is necessary to look into the facts of each case. This one arose on certificate from the Second Circuit. The certificate recites but meager facts; the opinion even less. Both, therefore, should be read together. The certificate is not set forth in the opinion but, from an examination of it, it appears that one Cohen, a private in the Intelligence Service of the Army, by fraud gained access to Gouled's office and carried away several documents, and that Gouled did not know this until confronted by Cohen's testimony at the trial. Later a warrant was issued to search for papers alleged by affidavit to be in Gouled's possession and they were seized. Motion was made for their return, which was denied. The first question relating to the right to use papers purloined from the defendant's office

by a Government agent was, of course, answered negatively.

The four other questions dealt with whether documents taken under the warrant calling for a search for papers "of evidential value only" could be used against the defendant. Although the certificate shows and the Court comments upon the fact that no attack was raised on the validity of the search warrant, in reality the opinion admits of no other conclusion than that it was wholly void. The Court said (p. 309): "There is no special sanctity in papers, * * * to render them immune from search and seizure," but—

> search warrants * * * may not be used as a means of gaining access to a man's house or office and papers *solely for the purpose of making search to secure evidence* to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, * * *. (Italics ours.)

It is manifest, therefore, that this case rests upon the familiar principle found in every opinion from this Court on the subject that, absent an arrest or a lawful warrant issued upon an affidavit showing evidence of probable cause fairly obtained, agents of the Government may not under color of their governmental authority or its processes go rummaging into a man's house. Again we observe the

real gravamen of the agent's offense which this Court condemned lies in the wrongful entry, and all that grew out of that original fraud, though it later assumed the guise of legality, failed to change its unconstitutional character. Cohen's entry with the opening wedge of information he obtained was like that of the marshal in the *Weeks case* and like that of the officers who ransacked the corporation office in the *Silverthorne Lumber Company case.* In the latter the United States Attorney tried to lend color by securing an invalid *subpœna duces tecum* to recapture the evidence. The Intelligence Department used Cohen's first stolen information to secure a search warrant which had no sufficient affidavit of facts for its issuance. It was just a cloak to cover the real motive, which was to go rummaging for more evidence. Substantially, therefore, the purported search warrant was *no* search warrant. Such a situation is far different from that in the instant case, where the affidavit upon which the warrant issued was unusually full; the warrant was regular and valid, the entry lawful, and seizure of the ledger and papers is justified either as an incident to the execution of the search warrant, or as an incident to the right of search arising from the arrest of one found in crime.

Amos v. *United States,* 255 U. S. 313 (1921): Here again Government agents, without warrant of any kind and using the coercion of the fact that they were Federal officers, gained admittance to the

defendant's home and store and seized certain articles for the return of which application was made and denied. Reversal was ordered on authority of the *Gouled case*.

Burdeau v. *McDowell,* 256 U. S. 465 (1921): McDowell was discharged from the employ of Henry L. Doherty & Company, of New York, for whom he had acted as manager of their Pittsburgh office. An officer of the Doherty Company, with private detectives, took possession of two rooms, one of which was alleged to be McDowell's private office, blew open safes, and took correspondence and papers. Some were turned over to Burdeau, prosecuting officer of the Department of Justice. McDowell made application in the Federal District Court for the return of documents held by Burdeau. The District Court granted the petition. This Court overruled the decision of the District Court, holding that while that court had authority to control the disposition of the papers, and they might have been subpœnaed from the custody of the thief, nevertheless the protection of the Constitution extends only to governmental action, and as the papers had come into the possession of the Government without a violation of petitioner's rights by governmental authority, there was no reason why the fact that individuals unconnected with the Government might have wrongfully taken them should prevent their being used for prosecuting the defendant.

Carroll v. *United States,* 267 U. S. 132 (1925): This case set up the rule for search of moving vehicles without warrant where the officer has probable cause for believing them to be carrying contraband.

Agnello v. *United States,* 269 U. S. 20 (1925): Officers seeing defendant sell narcotics arrested him and searched the immediate vicinity of the commission of the offense. Then while defendants were being taken to the police station other officers went to Agnello's home, searched it, and found cocaine. The Government offered testimony of this fact, objection to which was overruled. Defendants were convicted. This Court in reversal as to Agnello held that the search of his home several blocks from the scene of the arrest was an unreasonable search. In this case the same distinction exists as in the others from the case at bar—no valid search warrant gave entry, nor was the arrest made at the place searched.

Byars v. *United States,* 273 U. S. 28 (1927): Defendant's home was searched by police armed with a municipal search warrant. A Federal prohibition agent accompanied the city officers and assisted them. Strip stamps were seized and retained by the Federal officer. The defendant was charged in United States Court with unlawful possession of counterfeit stamps. He made timely motion for the return of the stamps, which was denied, and he was convicted. This Court, in reversing the judgment, held that the facts reasonably suggested that

the Federal officer shared in the responsibility of the seizure; that the search warrant would have been bad under Federal law; that although the right of the Federal Government to use evidence improperly seized by State officers operating entirely upon their own account is not to be questioned, the rule is otherwise when a Federal agent, under color of his office, participates in the wrongful search and seizure.

Throughout all these cases the Court, in applying the constitutional rights of the citizen, has jealously guarded his home, and, in wider area, his entire premises and effects, from unlawful *entry*. That has led not only to rejection of evidence which Federal officers secured by breaking locks, but also what they obtained by abusing the use of a search warrant, in making entry under color of one illegally issued or fraudulently obtained. It has led to condemnation of any encroachment under "color of Federal office."

The Fourth Amendment has thus been construed to protect the citizen from disorderly intrusion of irresponsible administrative officials. It has never been used by this Court to strengthen a criminal's efforts at isolation and secretion of evidence *after sufficient knowledge of his crime has been obtained to secure a lawful warrant of arrest or search of his premises.* When a citizen is surprised in the commission of crime and arrested, the constitutional protection he could otherwise claim yields to the larger right of the sovereign to search him. So, too,

when a place is known to harbor unlawful articles, the constitutional right to keep the arm of the law out of that place yields to the right of the sovereign to enter and take not only what may have been known to be harbored there and therefore named in the warrant as the objects of search, but other things incidentally discovered which closely relate thereto. As stated by the Circuit Court of Appeals for the Eighth Circuit in *Furlong* v. *United States,* 10 F. (2d) 492, 494:

> Considering our increasing failure in dealing with crime, there is the highest wisdom in the following statement of the Supreme Court in *Carroll* v. *United States,* 267 U. S. 132:
>
> "The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interests and rights of individual citizens."

(A) THE SEIZURE WAS VALID AS INCIDENT TO THE EXECUTION OF THE SEARCH WARRANT

The doctrine of incidental seizure of documents or articles discovered while executing a search warrant was first recognized by this Court in the case of *Adams* v. *New York, supra.* The plaintiff in error in that case had been convicted in a court of the State of New York for violation of a statute of that

State making it an offense to have in possession gambling paraphernalia used in the game known as "policy." It appeared that in a raid of the defendant's premises police officers, having in possession a warrant authorizing a search for policy slips, not only seized some 3,500 such slips, but also seized and carried away a number of private papers belonging to the defendant of merely evidentiary value. These private papers were offered in evidence at the trial for the purpose of identifying the defendant's handwriting on the policy slips and of establishing his possession, with knowledge, of such slips. An objection by the defendant that said papers were inadmissible because seized in violation of his rights under the Fourth Amendment to the Constitution of the United States and that to receive them in evidence would compel him to be a witness against himself in violation of the Fifth Amendment was overruled and the papers were admitted. That action of the trial court was affirmed by the Court of Appeals of New York and the defendant brought the case to this Court upon writ of error setting up the aforesaid claims of denial of Federal constitutional rights. Passing the question of whether the Fourth and Fifth Amendments applied to state action, this Court decided the case on the merits and affirmed the judgment. After stating in the opinion that the right to seize lottery and gambling devices, such as policy slips, required no argument to sustain it, this Court said (p. 598):

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> But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to *punish wrongful invasion of the home of the citizen* or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect. (Italics ours.)

In the subsequent case of *Weeks* v. *United States, supra,* where a conviction in a Federal court was set aside because based in part upon the introduction in evidence of private papers of the defendant seized in his home by a United States marshal without a warrant, this Court, distinguishing the case from that of *Adams* v. *New York, supra,* stated the effect of the latter case as follows (pp. 395, 396):

> Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant

had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. * * *

* * * * *

It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The decision in the *Adams case,* as thus explained in the *Weeks case,* has never been overruled by this Court. It recognizes a manifestly just and moderate view of the duties of Government officers in execution of a search warrant. It may be suggested that to permit agents to carry away anything not named in the warrant is establishing a region of doubt where the rights of search would be uncer-

tain; but applying the rule of incidental seizure would be no more difficult than applying the doctrine of probable cause as announced in the *Carroll case,* which authorizes an officer to stop and search a moving vehicle. Elements by which each seizure could be fairly tested are apparent. It would, first, have to be upon a lawful warrant, issued upon probable cause to search for *actually named articles* which would form the true and primary object of the issuance of the warrant. It could not, as in the *Gouled case,* arise from a warrant issued to give color to a real motive to turn things over to find evidence. Second, the evidentiary articles seized would have to be found near and discovered incidentally to orderly and lawful steps taken in hunting for things named in the warrant. And third, the articles incidentally seized would have to *relate to* the materials forming the primary objects of the search. Although, as frequently quoted from the *Boyd case, supra,* p. 635, "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," this should not be so done as to multiply devious methods to sequester evidence of crime and to delay and impede the enforcement of criminal laws. The decisions from the Second Circuit in the *Kirschenblatt* and *Kirvin cases* upon which petitioner relies would have the latter effect. The Government may use evidence illegally gathered by others than its own officers. To balance that, and check a growing tendency toward law enforcement

through informants and zealous groups of private citizens it is important that the authority for Government agents to seize evidences of crime incidentally discovered should be upheld to the farthest margin of constitutional limitation. Of course suggestions of expediency can not override the guaranties of the Fourth Amendment. But it is fitting in close cases such as this to consider both the interests of the citizen and those of the sovereign, and to weigh them, in order to discover if possible the interpretation which will strengthen the orderly efforts of Federal agents in gathering evidence of law violation.

(B) THE SEIZURE WAS VALID AS INCIDENT TO A LAWFUL ARREST UPON THE PREMISES

The seizure of the ledger and other papers complained of was made by the Federal officers after they had arrested the defendant Birdsall for offenses against the National Prohibition Act committed in their presence. The general character and equipment of the place, the signal required to gain admittance, and the whiskey and glasses on the table at which patrons were seated were ample to apprise the officers that intoxicating liquor was possessed and sold on the premises and that the place was being maintained as a common nuisance in violation of the Federal Act. There can be no question, therefore, that the arrest of Birdsall, as the person found in charge of the establishment, was lawful.

The weight of authority is that upon a lawful arrest the arresting officer may seize whatever he finds either upon the person of the offender, or otherwise within his possession or control, which may be of aid in proving the offense. As stated in Wharton's Criminal Procedure, 10th Ed., Section 97:

> The general rule of law is that, in the absence of a statute, an officer has no right to take money or property from the person *or possession* of a prisoner, *except such as may afford evidence of the crime charged,* which is a means of identifying the criminal, or which may be helpful to the prisoner in effecting an escape. The officer has an undoubted right to make a search, and considering the nature of the accusation he may, when acting in good faith, take into his possession *any articles which he may suppose will aid in securing the conviction of the prisoner,* or will prevent his escape. (Italics ours.)

Upon the same subject, Bishop in his work on Criminal Procedure, 3d Ed., Section 211, says:

> The arresting officer should consider the nature of the accusation; then, if he finds on the prisoner's person, *or otherwise in his possession,* either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, *or as supplying evidence relating to the transaction,* he may take them, and hold them to

be disposed of as the court shall direct. (Italics ours.)

In *Weeks* v. *United States,* 232 U. S. 383, this Court, pointing out that the search and seizure in that case by a United States Marshal without a warrant did not fall within the recognized instances where a search and seizure without a warrant may lawfully be made, said (p. 392):

> What then is the present case? Before answering that inquiry specifically it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits *or evidences of crime.* This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, Section 211; Wharton, Crim. Plead. and Practice, 8th ed., Section 60; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245. * * * Nor is it the case of burglar's tools *or other proofs of guilt* found upon his arrest *within the control* of the accused. (Italics ours.)

In *Carroll* v. *United States,* 267 U. S. 132, 158, the right to search and seize as an incident to a lawful arrest was defined as follows:

> When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and *which may be used to prove the offense* may be seized and held as evidence

in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. (Italics ours.)

Other cases in which the above statement by Bishop is cited as a correct exposition of the law are:

Furlong v. *United States* (C. C. A., 8th), 10 F. (2d) 492.

Sayers v. *United States* (C. C. A., 9th), 2 F. (2d) 146.

United States v. *Wilson* (S. D., N. Y.), 163 Fed. 338.

Getchell v. *Page,* 103 Me. 387.

In the *Furlong case* prohibition officers went to the defendant's soft-drink place and purchased whiskey with a marked one dollar bill. They thereupon signaled other Federal officers, who rushed in. The officer in charge demanded that the marked bill be handed over to him, and in compliance with that demand the bartender, at Furlong's direction, opened the cash register, took out the bill, and handed it to the officer. In a subsequent prosecution of Furlong for violation of the National Prohibition Act the bill was introduced in evidence over the defendant's objection that it was obtained by an unconstitutional search and seizure. Holding the evidence to have been properly received, the Circuit

Court of Appeals, after quoting Bishop's statement of the law, *supra,* said (p. 494):

> This statement is approved by the Supreme Court in *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392. See, also, *Agnello* v. *U. S.,* 269 U. S. 20.
>
> The same doctrine is laid down in *Holker* v. *Hennessey,* 141 Mo. 527; *Ex parte Hurn,* 92 Ala. 102; *Getchell* v. *Page,* 103 Me. 387.
>
> It is the duty of the officer making an arrest to take money or other articles connected with the crime, or evidencing its commission, from the person of the defendant, or from his possession or control, and hold the same subject to the order of the court. In this case the officer had the same right to take the marked bill from the defendant's cash register as from his pocket. The extent of the search and seizure at the time of arrest must depend to some extent upon the nature of the crime.
>
> See, in addition to the above authorities, *Ash* v. *Commonwealth,* 193 Ky. 452; *Ragland* v. *Commonwealth,* 204 Ky. 598; *Sayers* v. *United States* (C. C. A.) 2 F. (2d) 146; *Brady* v. *United States* (C. C. A.) 300 F. 540.

In *Sayers* v. *United States, supra,* Federal officers were admitted by the defendant to a room on the second floor of a hotel upon their ringing the bell, and at their request were served by her with whiskey, which she procured from an adjoining kitchen

and for which they paid. The officers thereupon placed her under arrest and made a search which resulted in the finding of a large quantity of beer and the defendant's meat bill in the kitchen, and her record of savings and beer purchases and light bill in her room across the hall. The articles thus seized were later admitted in evidence over the defendant's objection that they had been obtained by an unlawful search and seizure. That action of the District Court was sustained by the Circuit Court of Appeals, which said (p. 147):

> A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before it, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. See *Adam's Case,* 192 U. S. 585; *Week's Case,* 232 U. S. 383; *Gouled's Case,* 255 U. S. 309; *U. S.* v. *Wilson* (C. C.) 163 F. 338.
>
> In any such search, not only may the instruments and fruits of crime be seized, but mere evidentiary articles, including papers incidentally discovered, may be likewise seized. This was expressly held in *Adam's Case, supra,* and has not been departed from in any qualification of said case. "There is no special sanctity in papers, as distin-

guished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of cases in which other property may be seized." *Gouled's Case, supra.* Of a person arrested, every garment and pocket may be searched, and the same principle authorizes that of a building, generally every room may be searched.

In the circumstances of the instant case, the arrest of defendant and the search of adjacent rooms and seizure of liquors and papers were a duty, were legal, and were not unreasonable within the import of the Fourth Amendment.

In *Getchell* v. *Page, supra,* local State enforcement officers executing a search warrant found liquor on the premises. They thereupon arrested the owner and seized and carried away as evidence certain articles not named in the warrant. In a subsequent suit for trespass brought by the owner against the officers the Supreme Judicial Court of Maine held that the officers were justified in seizing such property, saying (p. 390):

> It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by effi-

> cient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court. *Thatcher* v. *Weeks,* 79 Maine, 547; *Spalding* v. *Preston,* 21 Vt. 10; Bishop, Crim. Pro. 211.

In *Smith* v. *Jerome,* 93 N. Y. Supp. 202, the plaintiff and his wife were arrested in Cincinnati as fugitives from justice and returned to New York, where they were under indictment for conspiracy. At the time of their arrest the Cincinnati police searched their room and found among their effects certain letters which tended to prove them guilty of the offense with which they were charged. These letters were forwarded to the District Attorney in New York against whom the plaintiff brought suit to get them back. Holding that the plaintiff's petition must be denied, the court said:

> The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. The authorities on this head seem to be few, but only because the thing has

seldom if ever been questioned. We have at least one such authority in this state (*Houghton* v. *Bachman*, 47 Barb. 388), and there are several in England. This right and duty of search and seizure extend, however, only to articles which furnish evidence against the accused. They do not, for instance, permit the seizure of his money, unless it furnishes evidence of his guilt, and in no other case may a prisoner's money or other property to be taken from him. It does not sufficiently appear that the letters in question are not of such incriminating character.

Conceding the correctness of the general principle announced by the foregoing authorities, petitioner says:

> We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed * * *.

He insists, however, that only such evidence may be taken as forms an integral part and parcel of the crime. (Br. 15.) Certainly, as regards seizures from the person, petitioner's contention is wide of the mark. It is so well settled that *any evidence tending to prove the crime*, whether documentary or otherwise, may be seized from the person of one arrested that it will suffice to direct the Court's attention to one or two recent decisions on the subject.

In *People* v. *Chiagles,* 237 N. Y. 193, the defendant, upon his arrest for a felony, was searched and certain letters taken from his person. He moved for their return on the ground that their seizure was in violation of Section 8 of the Civil Rights Law of New York, which is substantially identical with the Fourth Amendment to the Constitution of the United States. The denial of that motion was sustained by the Court of Appeals in a well-considered opinion by Judge Cardozo wherein it was said (p. 195):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, ought not to be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Civil Rights Law, Sec. 8; Consol. Laws, ch. 6.) It is thus the statutes of New York express the principle that English law received as the outcome of the prosecutions of Wilkes and Entick. (*Entick* v. *Carrington,* 19 Howell's State Trials, 1030; *Wilkes' Case,* 19 Howell's State Trials, 1405; *Boyd* v. *U. S.,* 116 U. S. 616, 626.) The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common-law traditions. If immunity is to be conceived of as the rule, there is one exception that has been established as firmly as the rule itself. The government may "search the person of the accused when

legally arrested to discover and seize the fruits or evidences of crime." (*Weeks* v. *U. S.*, 232 U. S. 383, 392.) There is no dearth of illustrative precedents both in our own country and abroad. (*Dillon* v. *O'Brien*, 16 Cox C. C. 245; *U. S.* v. *Snyder*, 278 Fed. Rep. 650; *U. S.* v. *Wilson*, 163 Fed. Rep. 340; *U. S.* v. *Welsh*, 247 Fed. Rep. 239; affd., 267 Fed. Rep. 819; *U. S.* v. *Murphy*, 264 Fed. Rep. 842; *Woolfolk* v. *State*, 81 Ga. 551, 562; *People ex rel. Murphy* v. *Brown*, 83 Wash. 100; *Getchell* v. *Page*, 103 Me. 387; *State* v. *Hassan*, 149 Ia. 518, 524; *Closson* v. *Morrison*, 47 N. H. 482, 484; *Houghton* v. *Bachman*, 47 Barb. 388; 1 Bishop Crim. Pr., Sec. 211; 9 Halsbury Laws of England, p. 309; 13 id. p. 510.) The right goes back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught "with the mainour," still "in seisin of his crime." (2 Pollock & Maitland History of English Law, 577, 578.) The defendant, conceding the right, would, none the less, restrict the seizure to things subject to be taken under a search warrant when there is no arrest of the possessor. Search is then confined under our statute to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it is an instrument of crime. (Code Crim. Pro. Sec. 792). We find no support for a like restriction upon search incidental to arrest. The books speak broadly of searching the person of the prisoner for anything "that may be of use as evidence upon the trial"

(*Thatcher* v. *Weeks,* 79 Me. 547, 549), or for anything "that will aid in securing the conviction" (*Holker* v. *Hennessey,* 141 Mo. 527, 539; cf. *Weeks* v. *U. S., supra.* If things of evidential value are to be excluded unless of such a nature as to be themselves the instruments of felony, the line may not be drawn between books and papers on the one hand and other articles on the other. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." (*Gouled* v. *U. S.,* 255 U. S. 298, 309.) Letters to or from accomplices found on the person of a conspirator, and evidencing the plan or the execution of the conspiracy (cf. *Dillon* v. *O'Brien, supra,* at p. 248) will have to be returned to the prisoner for concealment or destruction if only the fruits or the implements of crime may be retained; but so also will a murderer's garments, stained with his blood in the course of the affray. Garments thus bespattered are typical examples of the things that precedent and practice permit the Government to keep. (*Woolfolk* v. *State, supra; State* v. *Baker,* 33 W. Va. 319.) The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation. (*Entick* v. *Carrington, supra.*) Search of the person becomes lawful when grounds for arrest and accusation have been

> discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.

In the later case of *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the Circuit Court of Appeals for the Second Circuit, citing the *Chiagles case* and many of the authorities therein referred to, observed (p. 203):

> It is true that the law has never distinguished between documents and other property found upon the person of one arrested. All may be used in the trial, so far as relevant.

If, therefore, as appears to be established beyond question, anything found upon the person of the one arrested may be seized if it tends to prove the offense for which the arrest is made, it can hardly be said that an unreasonable search and seizure within the Fourth Amendment results if the officer, looking about the place where the crime is committed, finds and takes similar evidence which the offender has thrown to the floor, or which the officer sees on a table, or in a drawer thereof, or in a closet. It is manifestly to cover instances of the latter sort that the rule, as stated by the authorities, embraces not only what is found on the person of the offender but what is found *otherwise in his possession or control*. Were the rule limited to things found on the person, the offender might in many cases prevent a conviction by the simple device of discarding damaging evidence from his person before the offi-

cer who saw him commit the illegal act could reach him. Certainly no such result is required by the Fourth Amendment. To say that the rule is so restricted would be to assert that if officers come upon a gambling place, an opium den, or a blind pig, see it in full operation, and arrest those in charge, they may search only the persons of those arrested for evidence of the scope of the crime and must stay their hands from taking documents lying all about relating to the placing of bets, the purchase of opium or liquor, and the payment of police graft, which so frequently underlies the maintenance of such environments of crime? Is it reasonable to assume that the Fourth Amendment extends such immunity to the *locus* of crime that, after officers have entered lawfully, seen the commission of the offense, and arrested the proprietors, the place may not be made to yield not only its contraband but the "other proofs of guilt" that accumulate at crime headquarters? If it is reasonable to strip the pockets of one put under arrest, is it an unreasonable seizure to take what may be lying at hand relating to the offense at the spot where the violation of law was in progress? And in seriously seeking the replies to such inquiries as they affect this case we are not dealing with the search of a man's home and the ransacking of his personal documents and effects. We are dealing, rather, with an offense which essentially had to have headquarters or guilty *res* for its commission, with a public place which was observed in full

illegal operation, and with the seizure of its book of account and the bills for its upkeep.

Recognizing the logic of extending the right to search beyond the person of the prisoner but declining to follow it, the Circuit Court of Appeals for the Second Circuit in the *Kirschenblatt case, supra,* said (p. 203):

> While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which *Entick* v. *Carrington,* 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was

general warrants that they especially had in mind. *Boyd* v. *U. S.*, 116 U. S. 616.

The Circuit Court of Appeals here lost sight of the premise upon which its statement was based, namely, that there had been a lawful arrest. It is doubtless true, in the absence of such an arrest, that premises may not be searched for everything which may incriminate the owner either by an officer who has gained a lawful entry thereto by virtue of a search warrant, or by one admitted by consent of the owner. There is, furthermore, nothing in *Entick* v. *Carrington* or in *Boyd* v. *United States,* cited by that court, to indicate that the English-speaking peoples regarded it as intolerable to search the premises where a lawful arrest had been made for evidence which would aid in the conviction of the offender. *Entick* v. *Carrington* was an action of trespass against certain officers who had arrested the plaintiff and searched for and seized his books and papers under authority of a general warrant. Holding that the warrant was void as having no sanction in the statutory or common law of England, the court gave judgment for the plaintiff. As the warrant was void the arrest made under it was, of course, unlawful. The *Boyd case* dealt with the constitutionality of a Federal statute pursuant to which Boyd had been compelled, by an order of the court, to produce a paper desired by the Government as evidence in an action to forfeit his property. In neither case did the court discuss or have in view a search and seizure made as an inci-

dent of a lawful arrest. It was so declared as to the *Entick case* in *Dillon* v. *O'Brien and Davis,* 16 Cox Crim. Cas. 245, where Palles, C. B., observed (p. 251):

> For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.

The principle giving rise to the rule that evidence found in the possession or control of one lawfully arrested may be seized and used against him in a prosecution of the offense is clearly stated in the leading case of *Dillon* v. *O'Brien and Davis,* above cited. That case arose in Ireland and was an action by Dillon to recover damages from certain peace officers for their alleged illegal arrest of the plaintiff and their seizure of certain bank notes, coins, and documents belonging to him. In defense of the action the officers averred that, having procured a warrant for the arrest of the plaintiff on a complaint that he was engaged with others in the commission of certain acts (conceded at the trial to amount to a conspiracy at common law), they went to the plaintiff's home in the execution of the warrant and there found him in a room with other parties to the conspiracy "engaged in receiving rents from certain tenants, and had books and papers in which they were making entries of the receipt of those rents, and also a certain tele-

gram, all of which were being used for the purpose of such combination and conspiracy"; that the defendants thereupon arrested the plaintiff and took into possession and detained the bank notes, coins, and papers "then being in the said house and room," for the purpose of producing the same as evidence in the prosecution of the plaintiff and others for the conspiracy charged. It was argued for the plaintiff that this statement of defense showed no justification for the seizure of the plaintiff's property; that whether or not the seizure would have been justified had the plaintiff been found committing a felony, it was not justified in the case at bar where the offense was merely a misdemeanor. The judgment of the court was announced by Palles, C. B. Following a review of the cases involving a seizure for evidentiary purposes of property found in the possession of one apprehended in the commission of a felony, he said (p. 249):

> I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being, whether this right extends to cases of misdemeanour. No case has been cited in which the right (in reference to mis-

demeanour) has been judicially decided to exist, and no textbook draws the distinction here attempted to be drawn. The matter must, therefore, be determined on principle. For this purpose I must first ascertain the reason of the rule as applicable to felony. * * * Its purpose and object, viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance if he can not otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I can not see how it can be enforced otherwise than by capture.

> If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged. It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists, and can not (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

The opinion thereupon proceeds to show that no sound reason exists why the rule thus applicable to felonies should not apply to misdemeanors as well, and concludes that the rule is applicable to both alike.

It is to be observed that the evidence seized in the foregoing case was not taken from the person of the one arrested, but was found "in said house and room." It will further be noted that the articles taken were not of such an inherent nature that they could not lawfully be possessed by anyone; in other words, they were not "contraband," such as counterfeit dies, gambling devices, burglars' tools, and the like, which the Government has the right to seize, no matter where or by whom possessed. It is true that, in view of the uncontroverted averment of the defense, that the articles

were being used at the time in the commission of the crime for which the plaintiff was arrested, the court declared that its decision was confined to a case of that character. Nevertheless, the ground upon which the seizure was upheld was of much broader scope. It was that officers are entitled upon making lawful arrest of one charged with crime "to take and detain property found in his possession which will form material evidence in his prosecution for that crime." Moreover, the principle of the common law to which the court referred as the basis of the rule was not restricted to any particular kind of property found in the possession of the prisoner, provided only that it was material evidence to establish the crime. The case has been repeatedly cited as having that effect. In the *Chiagles case,* heretofore cited, where the articles seized were letters of evidentiary value only, the Court of Appeals of New York cited *Dillon* v. *O'Brien,* as well as *Weeks* v. *United States,* 232 U. S. 383, 392, and many other cases, as authority for the right of the arresting officer to search the prisoner and seize mere evidences of crime. See also *Carroll* v. *United States,* 267 U. S. 132, 158.

When, therefore, it is borne in mind that in the instant case there was no search whatever for the books and papers seized by the arresting officers, and that those articles incidentally came to the officers' attention while they were conducting a lawful and orderly search for contraband, it is submitted,

both upon reason and authority, that the taking of said documents, considering them as evidence only, can not be regarded as constituting an unreasonable seizure within the Fourth Amendment.

(C) THE GRAY LEDGER WAS SUBJECT TO SEIZURE AS AN INSTRUMENTALITY OR MEANS USED IN COMMITTING THE OFFENSE

Whether or not as an incident of a lawful arrest property found within the control of the offender and of evidentiary value only may be lawfully seized, there can be no question that if the property thus found was used as an instrumentality or means for committing the offense it is a proper subject of seizure. *Agnello* v. *United States,* 269 U. S. 20, 30. The gray ledger involved in this case comes within the latter description. It was used by the defendants for recording the payments made for liquor purchased, the quantities of liquor delivered, the sums received for liquor sold, "gifts" made to the city police, the shares of the net proceeds due the respective "partners," the amounts withdrawn by them, and the wages paid to various persons employed in and about the place where the intoxicating liquor was possessed, kept for sale, and sold in violation of the National Prohibition Act. (R. 126–131.) Whether it would have been possible for the defendants to carry on their illegal enterprise without keeping some such record of their transactions is, to say the least, doubtful. In a conspiracy the

essence of the offense is the formation of the partnership relation in the commission of crime. Those necessary partnership accounts, therefore, which perpetuate this unlawful agreement are not merely evidence. They are actual means of commission or perpetuation of the offense itself. This the gray ledger was. These seven defendants could have all been together every day making common cause of their unlawful agreement to keep the nuisance in question. In that event, they would have sat around a common board dividing spoils, paying bills, and arranging for the purchase of liquor. That would have been an unnatural "means of committing the offense." The natural way, and the one used here, was to substitute for these meetings where all would have been present and participating, the keeping of a book of account recording their unlawful agreements as to the details of the conspiracy. The importance attached by the conspirators to the keeping of the book here involved is evidenced by the fact that they had it regularly audited by an accountant. (R. 141–154.)

Of somewhat similar books the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Dana*, 2 Metc. 329, 337, said:

> It has been objected further, that the warrant was illegally served, because the officer seized "books, etc.," and it is argued that books are not "materials for a lottery." But we think that books, kept in relation to the

> proceedings respecting a lottery, are to be considered as materials for a lottery; and it does not appear that any other books were seized.

In *United States* v. *Kraus* (S. D., N. Y.), 270 Fed. 578, the defendant as a wholesale liquor dealer was required by Section 3318 of the Revised Statutes, under pain of punishment as for a felony, to keep a record of his purchases and sales of distilled spirits in books prescribed by the Commissioner of Internal Revenue. He failed to make the proper entries in such books, but kept a separate record of his liquor purchases and sales. Upon the question of whether this latter record was subject to seizure under the search warrant provisions of the Espionage Act authorizing a seizure of "property used as means of committing a felony," the court, referring to the books required by Section 3318, said (p. 582–583):

> It must be owned that the case is not so clear as to evidences of sales and purchases that should have been transcribed into such books but were not. Yet it appears to me that documentary records used in the business, but not transcribed, are means used to avoid keeping the books, which is the crime itself. They become necessary, or at least convenient, in evading those entries which should be made. Therefore I hold that, when the books required under section 3318 are not kept or are kept insufficiently, all docu-

> ments showing transactions which should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act.

As in the instant case the defendant's business was itself a violation of the law prohibiting the maintenance of a common nuisance, it is plain that the keeping of the gray ledger was fully as much a means of committing that offense as was the keeping of the separate record in the *Kraus case* a means of violating Section 3318.

A like decision was rendered in *State* v. *Mausert,* 88 N. J. L. 286. In that case the defendant, charged with keeping a disorderly house, was arrested upon a warrant in the office of his hotel. At the time of the arrest the officer seized the hotel register and cashbook which were on a near-by counter. Holding that these books were properly seized and admitted in evidence against the defendant, the court said (p. 290):

> These books were in actual use as a means of carrying on the unlawful business, and were as much in defendant's possession and under his control when arrested as if he had them under his arm and dropped them to the floor. It is not a case where papers were secreted and intended to be kept private, nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful ele-

ment. There was no unreasonable search and seizure of incriminating evidence within the constitutional prohibition.

The cases cited show clearly, if authority to establish the point be needed, that the ledger kept by the defendants was a means used by them in committing the offense for which the arrest was made upon the premises, and that said book was accordingly a proper subject of seizure.

As regards the gas, water, telephone, etc., bills, the Government does not argue, as in the case of the ledger, that they constituted a means used by the defendants in committing the offense. It does respectfully urge, however, that as the papers in question identified the petitioner as the proprietor of the premises and tended, therefore, to show that he was a party to the offense committed thereon, they were, for the reasons given in subdivision (B) of this brief, properly received in evidence. But even if their admission in evidence was erroneous, petitioner's connection with the premises and with the offense committed thereon was so abundantly proved by other testimony at the trial (R. 156–159, 160–161, 162, 164, 192–193), that the error could in no way result to his prejudice.

CONCLUSION

It is submitted that the court below correctly held that no violation of petitioner's rights under the Fourth and Fifth Amendments resulted from

the seizure and use in evidence of the ledger and other papers complained of by petitioner and that its judgment should accordingly be affirmed.

Respectfully submitted.

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